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No.

IN THE

Supreme Court of the United States

October Term, 1981

GLASGOW, INC.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did not the courts below err in ruling that contractors are vicariously liable under 42 U. S. C. § 1981 for a union's racially discriminatory hiring-hall referrals to them where the contractors neither knew nor had reason to know of the discrimination?

II. Did not the courts below err in ruling that contractors are vicariously liable under such circumstances where also those contractors neither had control of nor the right to control the referrals and where those discriminatory referrals were in direct breach of a racially-neutral hiring-hall provision in effect between the union and the contractors?

III. Did not the courts below err in making Glasgow subject to a far-reaching mandatory injunction to remedy the union's discrimination and also imposing upon Glasgow a substantial financial obligation in connection with that injunction?

PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were:

1. Raymond Williams
   Willie McKay
   Marion J. Eaddy
   Randolph Hughes, Jr.
   Arel Brownlee
   William Bostic
   Kenneth Howard
   Alpha Christmas
   Ronald Richardson
   Clarence Winder
   Ronald Crawford
   Frank Gilchrist

who were plaintiffs below, respondents in this Court, and class representatives of more than 1,000 persons;

2. The Commonwealth of Pennsylvania which was a plaintiff below and a respondent in this Court;

3. Local 542, International Union of Operating Engineers which was a defendant below but not a petitioner to this Court;

4. Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware which was a defendant below, but not a petitioner to this Court;

5. The General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, and United Contractors Association which were defendants below and separate petitioners to this Court;

6. Glasgow, Inc. which was a defendant below, petitioner to this Court, and class representative of approximately 1,400 contractors; and

7. Bechtel Power Corporation and United Engineers & Constructors, Inc. which were class members but not parties below and separate petitioners to this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES IN THE COURT OF APPEALS	i
TABLE OF AUTHORITIES	iii
OPINIONS IN THE COURTS BELOW	2
JURISDICTION OF THIS COURT	2
THE STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	5
I. This Case Presents Important Questions of Federal Law Which Have a Profound Impact Not Only on the Construction Industry But Also on All Those Industries Throughout the United States Which Utilize Hiring Halls	5
II. The Decisions Below Conflict With Decisions of Other Federal Courts of Appeals, as Well as Applicable Decisions of This Court	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:	Page
Allen v. Pipefitters Local Union No. 208, 56 F. R. D. 473 (D. Colo. 1972)	11
City Bank v. Rivera Davila, 438 F. 2d 1367 (1st Cir. 1971)	11
City of Memphis v. Greene, 49 U. S. L. W. 4389 (U. S. 1981)	7
City of Milwaukee v. Saxbe, 546 F. 2d 693 (7th Cir. 1976)	9
Chicano Police Officer's Ass'n. v. Stover, 552 F. 2d 918 (10th Cir. 1977)	9, 10
County of Los Angeles v. Davis, 440 U. S. 625 (1979)	7
Craig v. County of Los Angeles, 626 F. 2d 659 (9th Cir. 1980)	9
Des Vergnes v. Seekonk Water Dist., 601 F. 2d 9 (1st Cir. 1979)	9
Detroit Police Officers Ass'n. v. Young, 608 F. 2d 671 (6th Cir. 1979)	9
Donnell v. General Motors Corp., 576 F. 2d 1292 (8th Cir. 1978)	9
Grigsby v. North Mississippi Medical Center, Inc. 586 F. 2d 457 (5th Cir. 1978)	9
Guardians Ass'n. v. Civil Service Comm'n., 633 F. 2d 232 (2d Cir. 1980)	9
Houston Chapter, Associated General Contractors, 143 NLRB 409 (1963), *enfd*, 349 F. 2d 449 (5th Cir. 1965); *cert. denied*, 382 U. S. 1026 (1966)	5
International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977)	7
Local 357, International Brotherhood of Teamsters v. NLRB, 365 U. S. 667 (1961)	5
Johnson v. Alexander, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978)	9
Lummus Co. v. NLRB, 339 F. 2d 728 (D. C. Cir. 1964)	10
McFadden v. Baltimore Steamship Trade Association, 8 BNA FEP Cases 391 (D. Md. 1972)	11

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Milliken v. Bradley, 418 U. S. 717 (1974) 11

Monell v. Department of Social Services of the City of New York, 436 U. S. 658 (1978) 7

Morrison-Knudsen Co., Inc. v. NLRB, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) 10

NLRB v. Master Stevedores Association, 418 F. 2d 140 (5th Cir. 1969) 10

Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571 (1981) 8

Rios v. Enterprise Ass'n Steamfitters, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd sub nom.* EEOC v. Enterprise Ass'n Steamfitters, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977) 11

Swan v. Charlotte-Mecklenburg Board of Educ., 402 U. S. 1 (1971) 11

Vogler v. McCarty, Inc., 294 F. Supp. 368, 374-75 (E. D. La. 1968), *aff'd sub nom.* Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969) 11

Washington v. Davis, 426 U. S. 229 (1976) 7, 9

Statutes:

28 U. S. C. § 1254(1) 2

29 U. S. C. § 158(a)(1) and (2) 6

42 U. S. C.:

§ 1981 ..... *passim*

§ 1983 ..... 7, 8

Civil Rights Act of 1964, Title VII 3, 7, 9

Authorities:

Fed. R. Civ. P. 23(b)(2) 4

Restatement (2d) of Agency, § 214 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Glasgow, Inc. ("Glasgow") petitions this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 19, 1981.

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit for which review is sought is reported officially at 648 F. 2d 923. That decision affirmed a judgment of the United States District Court for the Eastern District of Pennsylvania, the opinion for which is officially reported at 469 F. Supp. 329.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on May 19, 1981.

This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

THE STATUTE INVOLVED

The following statute, 42 U. S. C. § 1981, is invclved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Third Circuit sitting *en banc* which decision affirmed by an *equally-divided* vote a decision by the United States District Court for the Eastern District of Pennsylvania (J. A. 8; 9-212). These decisions, which were rendered under 42 U. S. C. § 1981, were that Glasgow and the approximately 1,400 other contractors in the defendant class are vicariously liable to a plaintiff class of more than 1,000 persons. The basis for the decisions is the use by Glasgow and the other contractors of an exclusive hiring hall operated in a discriminatory fashion by Local 542 of the International Union of Operating Engineers ("Local 542"). The Third Circuit affirmed the issuance of a far-reaching mandatory injunction which has required and will continue to require the expenditure by Glasgow of substantial monies.

In addition, in this case, the Third Circuit affirmed by an *equally-divided* vote decisions of vicarious liability under § 1981 against three contractor associations, which will be the subject of separate petitions to this Court. The Third Circuit also affirmed by *unanimous* vote holdings of liability for racial discrimination under Title VII of the Civil Rights Act of 1964 and § 1981 against Local 542 and its apprenticeship program, which holdings this Court will not be requested to review.

In 1961, Local 542 set out to impose on all contractors working within its jurisdiction (eastern half of Pennsylvania and Delaware) an exclusive hiring hall referral system by demanding in its labor negotiations that year inclusion of such a provision in its collective bargaining agreements. Only after a destructive ten-week strike was Local 542 successful, and thereupon Glasgow and the other contractors involved became legally obliged to obtain their operating engineers exclusively from the Local

542 hiring hall (J. A. 23). The hiring hall provision which was agreed upon is racially neutral (J. A. 30).

In breach of this lawful hiring-hall provision, Local 542 engaged in racial discrimination in the making of work referrals to contractors (J. A. 120). Glasgow and the other contractors who were required to use the hiring hall neither knew nor had reason to know of that discrimination (J. A. 168, 195, 198).

While holding Glasgow and the other contractors liable, the courts below nevertheless ruled that there was insufficient proof by the plaintiffs that either Glasgow or the other contractors had discriminated. The sole basis for the liability of Glasgow and the other contractors in the defendant class was that they, as they were legally obliged to do, used Local 542's hiring hall. The courts below deemed it immaterial that Glasgow and the other contractors who were required to use the hiring hall had nothing to do with its operation and neither knew nor had reason to know of the discrimination taking place therein (J. A. 168).

As will be more fully developed hereinafter, these unique and indeed extraordinary decisions by the courts below present very important questions of federal law, especially the question of the correct construction of § 1981 and particularly the proof of intent thereunder. These decisions if left undisturbed will have a profound adverse impact on the literally thousands of employers and the hundreds of thousands employees who are involved with those industries throughout the United States which utilize hiring halls. These decisions also create major conflicts with decisions and principles of this Court, as well as several of the circuits.[1]

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1. Other important errors by the courts below, including but not limited to the scope of the injunction, the propriety of a Fed. R. Civ. P. 23(b)(2) defendant class, the existence of *in personam* jurisdiction over defendant class members, and the failure to con-

REASONS FOR ALLOWANCE OF THE WRIT

I. This Case Presents Important Questions of Federal Law Which Have a Profound Impact Not Only on the Construction Industry But Also on All Those Industries Throughout the United States Which Utilize Hiring Halls.

Hiring halls are used in many industries throughout the United States. For example, they are common in the sprawling maritime industry, as well as being widely used in the giant construction industry. This Court has recognized the practical necessities and potential benefits to employers and employees alike in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U. S. 667 (1961). In that case, this Court ruled that a hiring-hall provision which is racially neutral is a lawful contract provision.

With the question of the legality of hiring-hall provisions thus settled, the national labor policy then developed to a point where an employer who is faced with a collective bargaining demand for a hiring-hall provision is under substantial pressure to accede to that demand, especially after the ruling which confirmed that exclusive hiring halls are *not only lawful* but are *mandatory* subjects of collective bargaining.[2] Therefore, a union may bargain a demand for an exclusive hiring hall to impasse and strike therefor if it wishes to bring into operation the full pressure of its economic force.

The decisions by the courts below which are the subject of this petition plainly clash with this established

1. (Cont'd.)
sider individual work force characteristics of defendant class members, will be raised in this case by other petitioners to this Court.

2. *Houston Chapter, Associated General Contractors*, 143 NLRB 409 (1963), *enf'd*, 349 F. 2d 449 (5th Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966).

national labor policy by discouraging any employer from agreeing to use a hiring hall. By imposing, as the courts below did, what amounts to *strict liability* on Glasgow and on the approximately 1,400 other contractors here involved who did not know or have reason to know of Local 542's discrimination, they give a strong inducement to any employer faced with a demand or the need for a hiring hall to avoid it almost at any cost. The alternatives would be either exposure to a risk of staggering and unknown financial liability or perhaps an attempt by the employer to control the hiring hall, which clearly is impractical and in any event likely would be itself a violation of federal law.[3] Thus, the unavoidable result of the decisions by the courts below is inconsistency, if not outright conflict, in major national labor policies, as well as uncertainty, conflict, and even labor strife in those industries which over the years have utilized hiring halls. This Court, therefore, should take jurisdiction of and review this case with a purpose of rectifying the departure by the courts below from settled federal principles which have a profound impact on such a substantial portion of the public.

In addition, the decisions by the courts below obviously raise important questions under a federal statute in which this Court has shown great interest, 42 U. S. C. § 1981. Since the decisions at bar clearly recognize that Glasgow and the other contractors neither knew nor had reason to know of Local 542's discrimination, it follows inexorably that Glasgow and the other contractors could not have had any discriminatory motive or intent. Therefore, it is fair and indeed accurate to conclude that liability under § 1981 was imposed on Glasgow and the other contractors without proof that they intended to discriminate. In fact, the courts below ruled that § 1981 does not require such proof.

3. 29 U. S. C. § 152(a)(1) and (2).

The question of whether § 1981 requires proof of discriminatory intent—in contra-distinction to Title VII of the Civil Rights Act of 1964[4]—has twice before been before this Court in *City of Memphis v. Greene*, 49 U. S. L. W. 4389 (U. S. 1981) and *County of Los Angeles v. Davis*, 440 U. S. 625 (1979). However, those cases were disposed of on other grounds. In no case has this precise issue been dealt with on the merits by this Court.

Furthermore, and as will be demonstrated in more detail below, the rulings by the courts below that § 1981 does not require proof of discriminatory intent are in direct conflict with decisions of six other circuits, as well as being in conflict with the principles established by this Court in *Washington v. Davis*, 426 U. S. 229 (1976).

Further to the construction of § 1981—and disregarding for the moment the question of discriminatory intent—the case at bar raises the very important threshold question of whether there can be *any* vicarious liability *at all* under § 1981 and if so under what circumstances. This Court ruled in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell*, in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains ". . . a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra*, 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that § 1981 as well will not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic purpose of § 1981, which is, as set forth heretofore, to prohibit only

4. *International Brotherhood of Teamsters v. United States*, 431 U. S. 324 (1977).

purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

In addition to the factors pointed out above, the courts below invoked the doctrine of *respondeat superior* and imposed vicarious liability on Glasgow and the other contractors even though it was quite clear that they neither controlled nor had the right to control the operation of the Local 542 hiring hall. Moreover, as a reserve theory for imposing vicarious liability, the courts below looked to the elusive principle of non-delegable duty, which is articulated in Restatement (2d) of Agency, § 214, and then read this into § 1981. Even if the limits of § 1981 are not sufficiently circumscribed to rule out vicarious liability, then this Court should settle the very significant question of federal law as to precisely when such liability is justified. In that regard, the plain departure by the courts below from the well-settled principles of *respondeat superior* in their construction of § 1981 clearly was erroneous and is in direct conflict with the principles of federal statutory construction set forth by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571 (1981).

II. The Decisions Below Conflict With Decisions of Other Federal Courts of Appeals as Well as Applicable Decisions of This Court.

The courts below held squarely that § 1981 does not require proof of discriminatory intent. By so doing, the Third Circuit placed itself in direct conflict with decisions

in six other federal circuits and with dicta in at least two more. *City of Milwaukee v. Saxbe,* 546 F. 2d 693 (7th Cir. 1976); *Chicano Police Officer's Ass'n. v. Stover,* 552 F. 2d 918 (10th Cir. 1977); *Johnson v. Alexander,* 572 F. 2d 1219 (8th Cir.), *cert. denied,* 439 U. S. 986 (1978); *Donnell v. General Motors Corp.,* 576 F. 2d 1292 (8th Cir. 1978); *Guardians Ass'n. v. Civil Service Comm'n.,* 633 F. 2d 232 (2d Cir. 1980); *Grigsby v. North Mississippi Medical Center, Inc.,* 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n. v. Young,* 608 F. 2d 671 (6th Cir. 1979); *Des Vergnes v. Seekonk Water Dist.,* 601 F. 2d 9 (1st Cir. 1979). In these cases, it is correctly recognized that § 1981, unlike Title VII, requires more proof than simply proof of disparate impact. Instead, they state that § 1981 requires for its violation a motive or intent to discriminate. This becomes critical in the case at bar when it is remembered that Glasgow and the other contractors neither knew nor had any reason to know of Local 542's discriminatory referrals, let alone their having the requisite motive or intent. Therefore, this Court should now resolve this major conflict of circuits and provide the definitive construction of § 1981 which is so much needed.

In addition, the rulings of the courts below that proof of discriminatory intent is unnecessary for a violation of § 1981 are in conflict with the principles announced by this court in *Washington v. Davis,* 426 U. S. 229 (1976). Although that case sets forth the standard of proof to show a violation of the Equal Protection clause, the message that it bears regarding § 1981 appears clear. Although it is true that several circuits have recognized that *Washington v. Davis* strongly suggests that § 1981 requires proof of discriminatory intent,[5] as stated above it is time

5. *Craig v. County of Los Angeles,* 626 F. 2d 659 (9th Cir. 1980); *Guardians Ass'n. v. Civil Service Comm'n.,* 633 F. 2d 232

that this Court clearly confirms that very important rule of federal law.

Further to the conflict of circuits created by the decisions of the courts below in reaching the rather astounding decisions that they did, the courts below relied upon a line of cases under the National Labor Relations Act as amended. In this line, they relied most heavily upon *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) for the proposition that an employer who uses a union hiring hall may be liable for the union's discrimination on account of union membership without regard to whether the employer knew or should have known of the union's discrimination. Although it is clear that the courts below misinterpreted *Morrison-Knudsen*,[6] that is unimportant to the instant issue of the granting of this petition because other circuits which have considered the question require knowledge by the employer as a predicate for any liability for union discrimination. *E.g., NLRB v. Master Stevedores Association*, 418 F. 2d 140 (5th Cir. 1969) and *Lummus Co. v. NLRB*, 339 F. 2d 728 (D. C. Cir. 1964). Therefore, when the Third Circuit ruled that it is immaterial whether Glasgow and the other contractors knew or had reason to know of Local 542's discrimination, it drew itself into direct conflict with at least the Fifth and the District of Columbia Circuits on this important question of federal law. As with others, this conflict should now be resolved by this Court.

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5. (Cont'd.)
(2d Cir. 1980); *Chicano Police Officer's Ass'n. v. Stover*, 552 F. 2d 918 (10th Cir. 1977).

6. As the Fifth Circuit correctly recognized, in *Morrison-Knudsen* the employer had knowledge of the union's discrimination. *NLRB v. Master Stevedores Assoc.*, 418 F. 2d 140, 142 (5th Cir. 1969).

Finally, the decisions of the courts below appear to conflict even with the few cases which deal with employer or association liability for union discrimination on the basis of race in a hiring-hall setting. *Vogler v. McCarty, Inc.*, 294 F. Supp. 368, 374-75 (E. D. La. 1968), *aff'd sub nom. Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969); *Allen v. Pipefitters Local Union No. 208*, 56 F. R. D. 473 (D. Colo. 1972); and *McFadden v. Baltimore Steamship Trade Association*, 8 BNA FEP Cases 391, 393 (D. Md. 1972). In each of these cases, the employers and associations were held *not* liable, while the courts never even inquired into the question of knowledge by the employers or associations.

Finally, it is also noted that monetary "injunctive" relief ordered against the Petitioners by the district court and affirmed by Third Circuit conflict with well-established principles of this Court. As previously noted, there simply is no basis in equity for the district court's imposition of such an extreme monetary remedy against the Petitioners herein. As this Court has emphasized, the scope of the equitable remedy must be determined by the nature of the violation. *Swan v. Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1 (1971); *Milliken v. Bradley*, 418 U. S. 717 (1974). Similarly, the imposition by the courts below of a monetary "injunction" against the non-discriminating Petitioner trade associations herein is in conflict with the decisions of at least two other circuit courts. *City Bank v. Rivera Davila*, 438 F. 2d 1367, 1371 (1st Cir. 1971); *Rios v. Enterprise Ass'n Steamfitters*, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd sub nom. EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977).

CONCLUSION

Since this case presents questions in respect of important matters of federal law which have a wide impact and presents conflicts with decisions of at least six other circuits, this Court should grant this petition, take jurisdiction of this case, and review the questions presented.

Respectfully submitted,

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